STATE OF MICHIGAN

COURT OF APPEALS

RONALD ENGLE,

Plaintiff-Appellant,

v

CITY OF LIVONIA and MAYOR OF LIVONIA,

Defendants-Appellees.

UNPUBLISHED
September 16, 2003

No. 240206
Wayne Circuit Court
LC No. 00-018260-CZ

Before: Hoekstra, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Facts and Procedure

Defendant city of Livonia hired plaintiff as its Fire Chief on September 7, 1993. In 1995, Jack E. Kirksey was elected to be the mayor of Livonia. Plaintiff heard rumors that Kirksey, when elected, was going to remove him as Fire Chief. However, Kirksey assured plaintiff that this rumor was not true. On November 21, 1995, firefighters union officials approached the mayor-elect Kirksey and told him that they wanted plaintiff removed from the Fire Chief position. However, when Mayor Kirksey took office in 1996, he did not remove plaintiff.

Mayor Kirksey stated in his deposition that he made the decision to instruct plaintiff to begin looking for another job on February 16, 1999, at a meeting with three city officials. Mayor Kirksey decided to allow plaintiff one year to find another job. One of the officials spoke with plaintiff and informed him of the decision made at the meeting. On the same day as the meeting, plaintiff filed a medical certification statement with the Livonia Civil Service Commission (LCSC), indicating that he was experiencing panic attacks in the workplace and requesting a leave of absence from work. He subsequently filed a worker's compensation claim due to mental disability.[1] Mayor Kirksey later made the determination, after reviewing plaintiff's

[1] Livonia paid plaintiff worker's compensation benefits up until the date of plaintiff's discharge.
(continued…)

medical records, that plaintiff was capable of returning to work and directed him to return to work on October 25, 1999. On the days leading up to October 22, 1999, Mayor Kirksey made the final decision to terminate plaintiff and wrote plaintiff's letter of termination. When plaintiff returned to work on October 25, 1999, Mayor Kirksey gave plaintiff the letter informing him that his employment was terminated. The letter listed several reasons for plaintiff's termination: (1) plaintiff promoted Joel Williamson from Senior Inspector to Fire Marshal, contrary to the directions of Mayor Kirksey; (2) plaintiff performed a tainted and inappropriate investigation into various charges that were brought against Williamson; (3) plaintiff inconsistently disciplined Williamson and then testified against these disciplinary actions at a LCSC hearing; (4) plaintiff reviewed inappropriate material on his computer at work; (5) plaintiff lacked the ability to command the fire department; and (6) plaintiff deliberately destroyed records and documents that belonged to the city of Livonia. Plaintiff appealed his termination to the LCSC and the LCSC conducted an evidentiary hearing regarding the matter. On March 9, 2000, the LCSC issued a decision sustaining Mayor Kirksey's decision to terminate plaintiff.

On June 7, 2000, plaintiff filed a complaint for superintending control, seeking an order vacating the LCSC's decision upholding Mayor Kirksey's termination of plaintiff. In this complaint, plaintiff also set forth several other allegations, including civil rights violations, harassment, respondeat superior, breach of contract, statutory violations, libel, and slander. The trial court dismissed the portion of plaintiff's complaint seeking superintending control, concluding that Mayor Kirksey had the authority to terminate plaintiff and there was substantial evidence supporting the LCSC's determination that the mayor acted properly in terminating plaintiff.

On January 23, 2002, defendants filed a motion for summary disposition regarding plaintiff's other claims. Discovery concluded on January 31, 2002. On February 22, 2002, the day of the hearing on defendants' motion for summary disposition, plaintiff filed a motion to amend his complaint to add allegations that defendants intentionally interfered with plaintiff's employment contract, terminated plaintiff in retaliation for plaintiff's filing of a workers' compensation claim, and violated Michigan's policy of encouraging racial integration in fire departments by terminating plaintiff merely because he was encouraging such integration.[2] The trial court granted defendants' motion for summary disposition, concluding that the claims in plaintiff's original complaint lacked merit, and refused to entertain plaintiff's motion to amend his complaint.

II. Analysis

A. Plaintiff's Claim for Superintending Control

(…continued)

On July 17, 2000, a magistrate denied plaintiff's claim for mental disability. The worker's compensation appellate commission affirmed the decision to deny plaintiff's claim.

[2] Plaintiff stated in his deposition that, as Fire Chief, he recognized that there were no women or blacks working for the fire department and expressed a goal of diversifying the gender and racial make-up of the department. According to plaintiff, this upset many members of the firefighters union.

Plaintiff argues that the trial court erred in dismissing plaintiff's complaint for superintending control,[3] because defendants violated MCL 38.513 by terminating plaintiff without giving him a reasonable time to respond the termination notice before his LCSC hearing.[4]

> Superintending control is an extraordinary remedy, and extraordinary circumstances must be presented to convince a court that the remedy is warranted. 4 Martin, Dean & Webster, Michigan Court Rules Practice (2d ed), p 331. For an order of superintending control to issue, the plaintiff must show that a clear legal duty has not been performed by the defendant. *Beer v Fraser Civil Service Comm*, 127 Mich App 239, 242; 338 NW2d 197 (1983). The grant or denial of an order of superintending control is within the sound discretion of the court considering the matter. *In re Goehring*, 184 Mich App 360, 366; 457 NW2d 375 (1990). Absent an abuse of discretion, this Court will not disturb the denial of a request for an order of superintending control. *Id*. [*In re Wayne Co Prosecutor*, 232 Mich App 482, 484; 591 NW2d 359 (1998).]

MCL 38.513 provides, in pertinent part:

> In all cases of reductions, layoff, or suspension of an employee or subordinate, . . . the appointing authority shall furnish such employees or subordinate with a copy of reasons for layoff, reduction, or suspension and his reasons for the same, and give such employee or subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, of the subordinate shall be filed with the commission: Provided, however, That the employee or subordinate shall be entitled to a hearing before the commission as provided in section 14.6

Section 17a of the fire and police departments civil service act, MCL 38.501 *et seq.*, is read in conjunction with the other sections of the act. *McMullen v Saginaw City Manager*, 300 Mich 166, 168; 1 NW2d 494 (1942). MCL 38.517a(1) provides, "This act does not affect any city, village, or municipality until approved by a majority of the electors voting thereon at an election at which the question of adoption of this act for that city, village, or municipality is properly submitted." There is no indication on the record that Livonia adopted the fire and police departments civil service act by election as set forth in MCL 38.517a(1). Therefore, Livonia was not bound by section 13 of the act and plaintiff was not entitled to relief for any violation of this section. *Wayne Co Prosecuting Attorney v City of Highland Park*, 317 Mich 220, 225; 26 NW2d

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[3] "Decisions of municipal civil service commissions are reviewed through original actions for superintending control. . . . Because the Legislature has not provided for appeal from municipal civil service boards, . . . review is by complaint for superintending control." *In re Payne*, 444 Mich 679, 687; 514 NW2d 121 (1994).

[4] "[H]aving claimed an appeal from the final order (the order granting summary disposition), plaintiff is now free to raise any issue on appeal, including issues related to other orders in the case." *Dean v Tucker*, 182 Mich App 27, 31; 451 NW2d 571 (1990).

891 (1947). Instead, Livonia created the LCSC through its city charter. Section 16(j) of the 1997 revised Livonia charter submitted by defendants provides that a removed employee may appeal an order of removal to the LCSC. However, the charter does not give a removed employee a right to respond to the termination order prior to the LCSC hearing. Plaintiff was given a LCSC hearing, which is what he was entitled to under the Livonia charter. Therefore, the trial court did not abuse its discretion in dismissing plaintiff's claim for superintending control.

B. Plaintiff's Other Claims

1. Standard of Review

The trial court did not specify under which section it granted defendants' motion for summary disposition regarding plaintiff's other claims.[5] Because defendants and the trial court relied on documentary evidence beyond the pleadings to support the motion for summary disposition, this Court will consider defendants' motion as having been granted under MCR 2.116(C)(10). *Wayne Co v Plymouth Charter Twp*, 240 Mich App 479, 480 n 2; 612 NW2d 440 (2000).

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). A motion for summary disposition should be granted when, except in regard to the amount of damages, there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Veenstra, supra* at 164. In deciding a motion brought under this subsection, the trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Veenstra, supra* at 164. . . . The decision whether to grant a motion for summary disposition is a question of law that is reviewed de novo. *Id.* at 159. [*Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 611-612; 658 NW2d 494 (2003), lv gtd 468 Mich 942 (2003).]

2. Breach of Contract

Plaintiff argues that, because plaintiff's employment contract stated that he could only be discharged for good cause, the trial court erred in granting summary disposition of his breach of contract claim. However, plaintiff does not cite any legal authority in support of his argument and does not argue how defendants breached this "good cause" provision of plaintiff's employment contract. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Green Oak Twp v Munzel*, 255 Mich App 235, 244; 661 NW2d 243 (2003). Therefore, this issue was not properly presented for

[5] Defendants brought their motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10).

appeal and is abandoned. *Id.* In any case, plaintiff's complaint does not allege that defendants breached plaintiff's employment contract by terminating him without good cause.[6] Plaintiff concedes that the only way he could have shown that his contractual rights were violated was by having the opportunity to amend his complaint.[7] In so saying, plaintiff essentially admits that the facts were not sufficient to support the breach of contract claim as set forth in his original complaint.

3. Retaliation

Next, plaintiff argues that the trial court erred in granting summary disposition of his claim that defendants terminated plaintiff in retaliation for plaintiff's filing of a worker's compensation claim. The Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, provides, in pertinent part:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act. [MCL 418.301(11).]

To establish a prima facie case of worker's compensation retaliation, plaintiff has the burden to show that (1) he filed a worker's compensation claim and that this was known by the defendant, (2) the defendant took an employment action adverse to the plaintiff, (3) the defendant's stated reason for the adverse employment action was a pretext, and (4) the defendant's true reason for the adverse employment action was to retaliate against the plaintiff for having filed a worker's compensation claim. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999); see also, by analogy, *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). The plaintiff has the ultimate burden to show that there was a causal connection between the filing of his worker's compensation claim and the adverse employment action. *Chiles, supra* at 470. The plaintiff need only show that retaliation was one of the motivating factions behind the defendant's adverse employment action. *Id.*

In the present case, Mayor Kirksey stated in his deposition that he made the decision to instruct plaintiff to begin looking for another job on February 16, 1999. A city official spoke with plaintiff concerning the decision that he should look for another job. Plaintiff requested a leave of absence for mental disability on the same day as the meeting when this decision was made. He subsequently filed the worker's compensation claim due to mental disability.[8] This evidence demonstrates that Mayor Kirksey had decided to set in motion plaintiff's termination before plaintiff filed the worker's compensation claim. It is true that Mayor Kirksey terminated

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[6] Plaintiff alleges in his complaint that defendants breached his employment contract by failing to pay him the salary and benefit adjustments set forth in the contract.

[7] The amendment of the complaint issue is discussed, *infra*, in part 4 of this opinion.

[8] There is no dispute that Mayor Kirksey knew about plaintiff's worker's compensation claim.

plaintiff before the expiration of the one year Mayor Kirksey had given him to look for a new job. But Mayor Kirksey listed six reasons for terminating plaintiff's employment that were unrelated to plaintiff's worker's compensation claim in the October 22, 1999, termination letter. Plaintiff does not contest the trial court's determination that the LCSC appropriately concluded that the reasons cited in the letter were legitimate reasons for terminating plaintiff's employment. Instead, plaintiff points to evidence that includes his own deposition testimony that the city terminated him to save money and his own testimony that one city official complained about his filing of the worker's compensation claim. This deposition testimony is not enough to show that the reasons for terminating plaintiff listed in the October 22, 1999, letter were not valid and were a pretext. Plaintiff also points to several of his work evaluations indicating positive performance. But these evaluations only spanned from the time plaintiff was hired through September 1996, and Mayor Kirksey stated that he did not make the decision to begin the process of terminating plaintiff until February 1999. There is no evidence indicating that Mayor Kirksey's real reason for terminating plaintiff was because he filed a workman's compensation claim. Because plaintiff has not carried his burden of showing a causal connection between his termination and his filing of the worker's compensation claim, the trial court did not err in granting defendant's motion for summary disposition of plaintiff's retaliatory discharge claim.

4. Amendment of Complaint

Finally, plaintiff argues that the trial court erred in denying his motion to amend his complaint. We review for an abuse of discretion a trial court's decision whether to grant or deny a motion to amend a complaint. *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 486; 652 NW2d 503 (2002). "An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *Id.*

A court should freely grant leave to amend a pleading when justice so requires. MCL 600.2301; MCR 2.118(A)(2). A motion to amend a pleading should ordinarily be granted and should be denied only for the following particularized reasons: " '[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . .' " *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), quoting *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

In the present case, plaintiff filed the motion to amend his complaint on the day of the hearing on defendants' motion for summary disposition. The trial court granted defendants' motion for summary disposition and refused to entertain plaintiff's motion to amend the complaint. Plaintiff argues that the trial court abused its discretion because it did not give any reasons for denying his motion to amend his complaint and there was no indication that amendment of the complaint was done in bad faith, would prejudice defendants, or was futile. A trial court's failure to specifically state its reasons for denial of a plaintiff's motion to amend his complaint requires reversal unless the amendment would be futile. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). But the trial court explained on the record why it decided not to entertain plaintiff's motion to amend his complaint. One of the reasons the trial court gave for not allowing plaintiff to amend his complaint was that the allegations in the amended complaint had not been raised before and the amended complaint would have totally

altered the thrust of the case, thereby resulting in prejudice to defendant. In other words, the trial court denied plaintiff's motion to amend his complaint due to undue delay and undue prejudice to defendants.

We conclude that the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint. Plaintiff did not move to amend his complaint until more than 1½ years after filing his original complaint. He filed the motion to amend on the day of the hearing on defendants' motion for summary disposition and after the close of discovery. Plaintiff's motion included new allegations that had not previously been raised, including the allegation that plaintiff was terminated because he wanted to integrate minorities into the Livonia fire department. Delay, alone, is not a sufficient reason to deny a motion to amend a complaint. *Jager, supra* at 487. However, a trial court may properly deny a motion to amend if the delay results in actual prejudice. *Id.* A defendant is entitled to notice of what claims he must defend against and there comes a point in litigation where a defendant cannot reasonably be expected to defend against an amendment. *Id.*

> "[A] trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." [*Jager, supra* at 487, quoting *Weymers, supra* at 659-660.]

Plaintiff argues that he should have been allowed to amend his complaint because a trial date had not been set, defendants were put on notice of the discrimination claim when plaintiff was deposed on October 1, 2001, and plaintiff's original attorney withdrew without having conducted any discovery and the new attorney only had about five months to conduct discovery. In his deposition, plaintiff stated that he was terminated partially based on his efforts to integrate the fire department. However, defendants were given no other indication that plaintiff would use this deposition testimony and assert a claim related to this integration issue. Plaintiff's second attorney had nine months before moving to amend the complaint to give defendants notice of the new claims.

In *Jager, supra* at 486-488, this Court affirmed the trial court's denial of the plaintiff's motion to amend her complaint in circumstances similar to the present case. The plaintiff in *Jager* moved to amend her complaint more than 1½ years after filing her complaint, after the close of discovery, after case evaluation, and after the trial court granted summary disposition to the defendants. *Id.* at 488. The trial court denied the plaintiff's motion to amend because the plaintiff's proposed amendment essentially alleged a new cause of action at a late stage in the litigation. *Id.* This Court concluded that the trial court did not abuse its discretion because the proposed amendment was prejudicial to one of the defendants because the defendant had no notice that he would be defending against the new claim. *Id.* Similarly, in the present case, plaintiff moved to amend his complaint more than 1½ years after filing her complaint, after the close of discovery, and on the day of the hearing on defendants' motion for summary disposition (albeit before the trial court granted defendants' motion for summary disposition). The proposed amendment was prejudicial to defendants because they did not have sufficient notice to defend themselves against plaintiff's new claims. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Brian K. Zahra